A

LOW HUAT CHENG & ANOR v. ROZDENIL TONI & ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
SURIYADI HALIM OMAR FCJ
HASAN LAH FCJ
B
ZAINUN ALI FCJ
AZAHAR MOHAMED FCJ
BALIA YUSOF WAHI FCJ
[CIVIL APPEALS NO: 02-53-08-2015 (W) & 02-59-09-2015 (W)]
9 AUGUST 2016

C

LAND LAW: *Indefeasibility – Transfer of land – Transfer through forged instruments of dealings – Competing interests of registered proprietor, immediate purchaser and subsequent purchaser – Action commenced when property already transferred by immediate purchaser to subsequent purchaser both of whom were bona*
D *fide purchasers for value without notice – Registered owner's title to property – Whether lost beyond recall – National Land Code, s. 340(2)(b)*

LAND LAW: *Sale of land – Damages – Sale and transfer of land through forged document – Interest and rights of registered proprietor – Registered proprietor losing land for good – Whether entitled to compensation or damages in lieu of return of*
E *property – Section 340 National Land Code – Whether have no bearing on award of damages*

The respondent ('plaintiff'), the administrator of the estate of his parents and the registered proprietor of a piece of land ('the property'), had his title to
F the property divested from him when, on 17 July 2008, his elder brother, the second defendant, forged a certain Power of Attorney and sold the property to the appellants ('third and fourth defendants'). The facts showed that, having purchased the property, on 31 March 2010, the third and fourth defendants sold the property to the fifth defendant (who became the registered proprietor on 11 August 2010), and thereafter the property was
G charged to the sixth defendant bank as security for a loan granted to the fifth defendant. The fifth defendant, as it were, defaulted in repaying the loan and in April 2012, the property was auctioned off and sold to the seventh defendant.

On 9 August 2012, the plaintiff commenced an action in the High Court
H against the first defendant (Director of Land and Mines) as well as the third and fourth defendants seeking to cancel all dealings pertaining to the property, the return of the property and for damages. The learned High Court Judge, invoking *Tan Ying Hong & Anor v. Tan Sian San & Ors ('Tan Ying Hong')* and s. 340(2)(b) and (3) of the National Land Code ('NLC'), allowed
I the claim and therefore set aside the third and fourth defendants' title to the property. It was the view of the learned judge that notwithstanding that the third and fourth defendants were *bona fide* purchasers for value of the

property, their title was defeasible as: (i) the transfer was transacted through an insufficient or void instrument; and (ii) they were the immediate and not subsequent purchasers of the property. It was also held that since the property was then no longer in their hands, they were therefore liable to pay damages to the plaintiff based on the market value of the property as at the date of judgment. On appeal, the decision of the learned judge was affirmed by the Court of Appeal, except for the order of assessment, where it was ruled that assessment should be based on the value of the property as at the date when the Form 14A was executed between the fraudster and the third and fourth defendants – and not as at the date of judgment.

Both the third and fourth defendants and the plaintiff appealed, whereof leave was granted by the Federal Court for the following issues to be posed to it, *viz*: (i) where an immediate purchaser of a registered land (who was also a *bona fide* purchaser for value) has already transferred that registered land to a subsequent purchaser (also a *bona fide* purchaser for value), whether a claim in damages is available to the true owner of the land as against the immediate purchaser pursuant to s. 340(2)(b) of the NLC ('first question'); and (ii) in quantifying damages available to the true owner against the immediate purchaser pursuant to s. 340(2)(b) of the NLC, whether damages to be assessed is as at the date of the true owner's deprivation or as at the date of judgment ('second question').

Held (allowing third and fourth defendants' appeal; dismissing plaintiff's appeal)

Per Azahar Mohamed FCJ delivering the judgment of the court:

(1) The plaintiff's contention that the third and fourth defendants were not *bona fide* purchasers for valuable consideration was without merits. The court below had made an express finding that the third and fourth defendants had purchased the property in question in good faith for value. It had not been shown that the finding was plainly wrong or perverse in any way. (para 43)

(2) The facts of this case were different from those in *Tan Ying Hong*. The bank in *Tan Ying Hong* who granted a loan to the chargors on a forged power of attorney was still the registered chargee at the time it filed the suit against the registered proprietor plaintiff, and that was why the Federal Court had little difficulty in declaring the charges void and setting the same aside. In the present case, however, difficulty arose because at the material time, the plaintiff filed the action in the High Court, the third and fourth defendants, as immediate purchasers, were no longer the registered proprietors since they had sold it to the fifth defendant, the subsequent purchaser, who had also purchased the property in good faith for value. This raised a difficult point of law, for which there was no precedent for the High Court and the Court of Appeal to fall back on. (paras 45 & 46)

(3) As immediate purchasers of a title tainted by a forged Power of Attorney, the third and fourth defendants acquired a title that was not defeasible and liable to be set aside before the fifth defendant, the subsequent purchaser became the holder of the registered title on 11 August 2010. However, by the time the plaintiff as the true original proprietor commenced the present action on 9 August 2012, the defeasible title of the third and fourth defendants as *bona fide* immediate purchasers had become indefeasible, as it had been passed to the fifth defendant, a *bona fide* subsequent purchaser. It followed that the High Court and the Court of Appeal had gone too far in declaring that the transfer of the property from the original owners (*ie*, the parents of the plaintiff) to the third and fourth defendants was void. Unlike in *Tan Ying Hong*, the issue of setting aside the third and fourth defendants' title did not arise, as the property had been sold to the fifth defendant. Clearly, a retransfer of the property to the plaintiff was not possible in the circumstances and the plaintiff's right of recovery of the property, to quote David SY Wong, 'is gone beyond recall'. (para 47)

(4) The question of whether *in lieu* of the retransfer of the property a claim in damages is available to the plaintiff as the true owner of the property under s. 340 of the NLC must stand and fall on the basis of that specific provision. It is thus necessary to read the wordings and purport of the provision with great care. (para 48)

(4a) Section 340(2) of the NLC creates a cause of action which is independent of any common law claim for tort or breach of contract. Over and above this, the cause of action envisaged under s. 340 is a statutory claim, where the relief is explicitly specified therein, namely setting aside the title or interest in question. Clearly, the provision does not at all envisage a relief in damages. (para 48)

(5) A statutory claim brought to set aside a title or interest upon one or more of the grounds of defeasibility specified under s. 340 of the NLC, as in the present case, is an action *in rem* brought for the assertion of property, which is enforceable against the world at large, as against the right *in personam* for damages which is enforceable against specified person and arose out of an obligation whether in contract or in tort. (para 49)

(6) The Privy Council in *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* clearly spelt out that the award of damages was not made under s. 340 of the NLC but was awarded in tort. The plaintiff was hence plainly wrong in treating that case as having stated the proposition that s. 340 of the NLC not only allowed the court to set aside the impugned transfer but also to award damages since the property was no longer in the hands of the third and fourth defendants. To accede to such interpretation would tantamount to reading into s. 340 words which were not there. (paras 53-55)

(7) Section 340 of the NLC does not provide for the remedy of damages and the High Court and the Court of Appeal had no jurisdiction to do so. All that the section provides is the setting aside of the impugned title or interest upon one or more of the grounds of defeasibility specified therein. Bearing in mind that it was an action *in rem*, namely an action directed against property, this court was not convinced that under s. 340 the court has the power to award damages. Both the High Court and the Court of Appeal therefore erred in law and in fact, culminating in a miscarriage of justice, in holding that as the third and fourth defendants were in no position to return the property to the plaintiff, they were statutorily bound to make good such loss by paying damages. (paras 56 & 57)

(8) The plaintiff's claim *in personam* for damages against the third and fourth defendants herein was founded in tort of negligence. The plaintiff however had not at all brought home the case of negligence against the third and fourth defendants and no attempt whatsoever was made to affix any knowledge of the defective Power of Attorney on the part of the latter. On the contrary, the third and fourth defendants had proven their defence as *bona fide* purchasers of the property for value without notice. (paras 60 & 61)

(8a) In the circumstances of this case, damages as a relief in a claim *in personam* founded in tort were only available if the plaintiff had proven that the third and fourth defendants had wronged him in a way as can be seen in *Datuk Jagindar Singh & Ors v. Tara Rajaratnam*. Whilst the plaintiff did suffer, his remedy was against the second defendant. Since a judgment in default had been obtained against the second defendant, the plaintiff should proceed to assess damages against him. (paras 61 & 62)

(9) For all the reasons explained, the court would answer the first question in the negative. Consequently, it was not necessary to answer the calculation of damages in the second question. The court would leave that point open. (para 63)

Bahasa Malaysia *Headnotes*

Responden ('plaintif'), pentadbir kepada harta pusaka ibu bapanya dan pemilik berdaftar sebidang tanah ('hartanah'), mendapati hak miliknya terhadap hartanah lupus apabila, pada 17 Julai 2008, abang beliau, iaitu defendan kedua, telah menjual hartanah tersebut kepada perayu-perayu ('defendan ketiga dan keempat') dengan menggunakan satu Surat Kuasa Wakil yang dipalsukan. Fakta menunjukkan bahawa, setelah membeli hartanah tersebut, pada 31 Mac 2010, defendan ketiga dan keempat telah menjual hartanah kepada defendan kelima (yang menjadi pemilik berdaftar pada 11 Ogos 2010), di mana hartanah kemudiannya digadai kepada bank defendan keenam sebagai cagaran kepada satu pinjaman yang diberikan

kepada defendan kelima. Defendan kelima, bagaimanapun, gagal membayar balik pinjaman dan akibatnya, pada bulan April 2012, hartanah tersebut dilelong dan dijual kepada defendan ketujuh.

Pada 9 Ogos 2012, plaintif memulakan tindakan di Mahkamah Tinggi terhadap defendan pertama (Pengarah Tanah dan Galian) serta defendan-defendan ketiga dan keempat, memohon untuk membatalkan urusan-urusan berkaitan dengan hartanah, untuk pengembalian tanah dan untuk ganti rugi. Yang arif Hakim Mahkamah Tinggi, dengan mengguna pakai *Tan Ying Hong & Anor v. Tan Sian San & Ors ('Tan Ying Hong')* dan s. 340(2)(b) dan (3) Kanun Tanah Negara ('KTN'), membenarkan tuntutan dan oleh itu mengetepikan hak milik defendan ketiga dan keempat. Menjadi pandangan yang arif hakim bahawa walaupun defendan ketiga dan keempat adalah pembeli suci hati hartanah, hak milik mereka boleh dibatalkan kerana: (i) pindah milik dibuat dengan menggunakan instrumen yang tidak sempurna atau batal; dan (ii) mereka adalah pembeli pertama dan bukan pembeli hartanah yang berikutnya. Juga diputuskan bahawa, oleh kerana hartanah pada waktu itu sudah tidak lagi berada dalam milikan defendan ketiga dan keempat, maka mereka bertanggungan untuk membayar ganti rugi kepada plaintif berdasarkan nilai pasaran hartanah pada tarikh penghakiman dibuat. Dalam rayuan, keputusan yang arif hakim telah disahkan oleh Mahkamah Rayuan, kecuali perintah mengenai penilaian, di mana diputuskan bahawa penilaian harus diasaskan kepada nilai hartanah pada tarikh Borang 14A dimeterai antara si penipu dengan defendan ketiga dan keempat – dan bukannya pada tarikh penghakiman dibuat.

Kedua-dua defendan ketiga dan keempat dan plaintif merayu dan berikutnya kebenaran diberi oleh Mahkamah Persekutuan supaya soalan-soalan berikut dibawa ke hadapannya, iaitu: (i) di mana seorang pembeli pertama sebidang tanah berdaftar (yang juga seorang pembeli suci hati untuk nilai) telah pun memindah milik tanah berdaftar tersebut kepada seorang pembeli terkemudian (juga seorang pembeli suci hati untuk nilai), sama ada suatu tuntutan ganti rugi terhadap pembeli pertama di bawah s. 340(2)(b) KTN terbuka kepada pemilik sebenar tanah ('soalan pertama'); dan (ii) dalam mentaksir ganti rugi yang terhak kepada pemilik sebenar terhadap pembeli pertama di bawah s. 340(2)(b) KTN, sama ada ganti rugi harus ditaksir berasaskan tarikh kehilangan tanah oleh pemilik sebenar atau pada tarikh penghakiman ('soalan kedua').

Diputuskan (membenarkan rayuan defendan ketiga dan keempat; menolak rayuan plaintif)

Oleh Azahar Mohamed HMP menyampaikan penghakiman mahkamah:

(1) Hujahan plaintif bahawa defendan ketiga dan keempat bukan pembeli suci hati dengan balasan bernilai adalah tidak bermerit. Mahkamah di bawah telah membuat dapatan ekspres bahawa defendan ketiga dan keempat telah membeli hartanah berkenaan secara suci hati dan untuk nilai. Tidak dibuktikan bahawa dapatan tersebut adalah salah atau cacat dari apa-apa segi.

(2) Fakta kes ini berbeza dengan fakta kes *Tan Ying Hong*. Bank dalam *Tan Ying Hong* masih merupakan pemegang gadaian berdaftar semasa ia memfailkan tindakan terhadap pemilik berdaftar plaintif, dan itulah sebabnya mengapa Mahkamah Persekutuan tiada masalah untuk mengisytiharkan gadaian tak sah dan mengetepikannya. Dalam kes semasa, masalah berbangkit kerana pada waktu plaintif memfailkan tindakan di Mahkamah Tinggi, defendan ketiga dan keempat, selaku pembeli pertama, sudah tidak lagi menjadi pemilik berdaftar kerana mereka telah pun menjualkan hartanah kepada defendan kelima, pembeli berikutnya, yang juga membeli hartanah dengan suci hati dan dengan nilai. Ini membangkitkan satu persoalan undang-undang yang sukar, di mana tiada duluan wujud untuk dijadikan pergantungan oleh Mahkamah Tinggi dan Mahkamah Rayuan.

(3) Sebagai pembeli pertama kepada hak milik yang dicemar oleh satu Surat Kuasa Wakil palsu, defendan ketiga dan keempat tidak memperoleh hak milik tidak boleh disangkal dan ia boleh diketepikan sebelum defendan kelima, iaitu pembeli berikutnya, menjadi pemegang hak milik berdaftar pada 11 Ogos 2010. Bagaimanapun, pada waktu plaintif sebagai pemilik asal sebenar memfailkan tindakan di sini pada 9 Ogos 2012, hak milik boleh disangkal defendan ketiga dan keempat telah menjadi tak boleh disangkal, kerana ia telah diserah kepada defendan kelima, seorang pembeli suci hati yang berikutnya. Ianya dengan itu mengikut bahawa Mahkamah Tinggi dan Mahkamah Rayuan telah pergi terlalu jauh apabila mengisytiharkan pindah milik hartanah daripada pemilik-pemilik asal (ibu bapa plaintif) kepada defendan ketiga dan keempat adalah tak sah. Tidak seperti dalam kes *Tan Ying Hong*, isu berkaitan pengetepian hak milik defendan ketiga dan keempat adalah tidak berbangkit, oleh kerana hartanah telah pun dijual kepada defendan kelima. Adalah jelas bahawa penyerahan balik hartanah kepada plaintif sudah menjadi mustahil dalam hal keadaan yang wujud, dan hak plaintif untuk mendapat kembali hartanah, meminjam kata-kata David SY Wong, 'telah hilang dan tak kembali lagi'.

(4) Persoalan sama ada sebagai ganti penyerahan semula hartanah maka satu tuntutan untuk ganti rugi adalah terbuka kepada plaintif selaku pemilik sebenar hartanah di bawah s. 340 KTN harus jatuh atau bangun bersama peruntukan khusus tersebut. Oleh itu, adalah perlu untuk membaca perbahasaan dan maksud peruntukan tersebut dengan penuh teliti.

(4a) Seksyen 340(2) KTN membentuk satu kausa tindakan yang berbeza dari mana-mana kausa tindakan tort atau pelanggaran kontrak di dalam undang-undang common. Selain daripada itu, kausa tindakan seperti yang digambarkan oleh s. 340 adalah satu tuntutan statutori, di mana relifnya diperkatakan di situ dengan jelas, iaitu dengan mengetepikan hak milik atau kepentingan yang berkaitan. Adalah jelas bahawa peruntukan tersebut sekali-kali tidak menganjurkan relif berbentuk ganti rugi.

(5) Satu tuntutan statutori yang dibawa bagi mengetepikan hak milik berdasarkan salah satu alasan ketakboleh-sangkalan seperti yang tertera dalam s. 340 KTN, sepertimana kes semasa, adalah satu tindakan *in rem* yang dibawa bagi menuntut hak terhadap hartanah terhadap semua orang, dan adalah berlainan dari hak *in personam* untuk mendapat ganti rugi yang hanya boleh dilaksanakan terhadap orang tertentu dan berbangkit dari satu obligasi dalam tort atau kontrak.

(6) Majlis Privi dalam kes *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* menerangkan dengan jelas bahawa award ganti rugi di situ tidak dibuat berdasarkan s. 340 KTN tetapi di bawah tort. Plaintif dengan itu jelas khilaf apabila menganggap kes tersebut sebagai menyatakan bahawa s. 340 KTN bukan sahaja membenarkan mahkamah mengetepikan pindah milik yang dicabar tetapi juga mengawardkan ganti rugi memandangkan hartanah sudah tidak lagi berada dalam milikan defendan ketiga dan keempat. Menerima tafsiran sedemikian bererti membaca ke dalam s. 340 perkataan yang tidak wujud di dalamnya.

(7) Seksyen 340 KTN tidak mempunyai peruntukan untuk pemberian award ganti rugi dan Mahkamah Tinggi serta Mahkamah Rayuan tidak berbidang kuasa untuk berbuat demikian. Apa yang diperuntukkan oleh seksyen tersebut hanyalah pengetepian hak milik atau kepentingan yang dicabar berdasarkan salah satu daripada alasan ketidak-sangkalan yang tertera di situ. Mengambil kira bahawa ia adalah satu tuntutan *in rem*, iaitu satu tindakan terhadap hartanah, mahkamah ini tidak diyakinkan bahawa di bawah s. 340 mahkamah mempunyai kuasa untuk mengaward ganti rugi. Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan dengan itu telah khilaf di sisi undang-undang dan fakta, dan sekaligus melakukan salah laksana keadilan, apabila memutuskan, oleh kerana defendan ketiga dan keempat tidak berada dalam keadaan yang membolehkan mereka mengembalikan hartanah kepada plaintif, maka mereka bertanggungan di sisi statut untuk menggantikan kehilangan tersebut dengan membayar ganti rugi.

(8) Tuntutan *in personam* plaintif untuk ganti rugi terhadap defendan ketiga dan keempat di sini didasarkan kepada tort kecuaian. Plaintif bagaimanapun langsung tidak mengemukakan apa-apa bukti kecuaian terhadap defendan ketiga dan keempat dan tiada cubaan dibuat bagi menunjukkan pengetahuan mereka mengenai Surat Kuasa Wakil yang cacat. Sebaliknya, defendan ketiga dan keempat telah membuktikan dalam pembelaan mereka bahawa mereka adalah pembeli suci hati hartanah untuk nilai tanpa notis.

(8a) Dalam hal keadaan kes ini, ganti rugi sebagai relif dalam satu tuntutan *in personam* berasaskan tort hanya boleh diperolehi jika plaintif membuktikan bahawa defendan ketiga dan keempat telah menjejaskannya dengan cara seperti yang berlaku dalam kes *Datuk Jagindar Singh & Ors v. Tara Rajaratnam*. Sementara plaintif di sini memang terjejas, remedi

beliau adalah terhadap defendan kedua. Oleh kerana penghakiman ingkar telah diperolehi terhadap defendan, plaintif sepatutnya meneruskan dengan menuntut penilaian ganti rugi terhadapnya.

(9) Atas sebab-sebab yang dijelaskan, mahkamah akan menjawab soalan pertama secara negatif. Oleh itu, tiada keperluan untuk menjawab soalan kedua. Mahkamah akan membiarkan soalan tersebut menjadi terbuka.

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***
Bachan Singh v. Mahinder Kaur & Ors [1956] 1 LNS 14 HC ***(refd)***
Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1994] 1 CLJ 19 HC ***(refd)***
Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1983] 1 LNS 21 FC ***(refd)***
Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1985] 1 LNS 157 PC ***(refd)***
Frazer v. Walker [1967] 1 AC 569 ***(refd)***
Hay Or Bourhill v. Young [1942] 2 All ER 396 ***(refd)***
Ho Kon Kim v. Lim Gek Kim Betsy and Others and Another Appeal [2001] 3 SLR (R) 220 ***(refd)***
Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor [1995] 3 CLJ 520 CA ***(refd)***
M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 5 CLJ 673 FC ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(dist)***
Tara Rajaratnam v. Datuk Jagindar Singh & Ors [1983] 1 CLJ 257; [1983] CLJ (Rep) 892 HC ***(refd)***
The Cobar Corporation Limited and Rubind Henrik Corbett (Trustee) v. The Attorney-General For New South Wales [1909] 9 CLR 378 ***(foll)***
Webb v. Webb (E.C.J) [1994] QB 696 ***(refd)***

Legislation referred to:

National Land Code, s. 340(1), (2)(b), (3)

Other source(s) referred to:

Judith Sihombing, National Land Code A Commentary, p 797
McGregor on Damages, 18th edn, pp 3, 5, 6, 7, 8
Tan Sook Yee, *Principles of Singapore Land Law,* 3rd edn, p 285
Teo Keang Sood & Khaw Lake Tee, *Land Law in Malaysia, Cases and Commentary*, 3rd edn, paras 4.152, 4.34

(Civil Appeal No: 02-53-08-2015 (W))
For the appellants - VS Viswanathan; M/s VS Viswa & Co
For the respondent - Yusman Mohd Badar & Azam Rashid; M/s Chambers of Yusman Azlin Anwar

(Civil Appeal No: 02-59-09-2015 (W))

For the appellant - Yusman Mohd Badar & Azam Rashid; M/s Chambers of Yusman Azlin Anwar

For the respondents - VS Viswanathan; M/s VS Viswa & Co

[Editor's note: For the Court of Appeal judgment, please see Tan Goat Eng & Anor v. Rozdenil Toni (As Administrator of Estates of Toni Ismail & Normy Mohamed Khatif; Deceased) [2015] 6 CLJ 486 (overruled);

For the High Court judgment, Kuala Lumpur; Civil Suit No: 21NCVC-195-08-2012 (overruled).]

Reported by Wan Sharif Ahmad

JUDGMENT

Azahar Mohamed FCJ:

Introduction

[1] There are two related appeals before this court arising from the same action in the High Court, namely Kuala Lumpur Civil Suit No: 21NCVC-195-08-2012. These two appeals bring into focus the all-too-familiar stories of innocent landowners, as in the case of *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133; [2001] 1 MLJ 241, who found themselves deprived of their property by forgery, or by means of forged instruments of dealings.

[2] The first appeal, which is Federal Court Civil Appeal No: 02-53-08-2015 (W) is by Low Huat Cheng and Tan Goat Eng (the third and fourth defendants in the High Court). It is against the decision of the Court of Appeal that affirmed the judgment of the High Court in which the High Court held that the third and fourth defendants' title to the property in question should be set aside and that further, the third and fourth defendants were liable to pay damages to the plaintiff. In respect of this appeal, leave to appeal was granted by this court on the following question of law:

> Where the immediate purchaser of a registered land (and who has been a *bona fide* purchaser for value without notice throughout) has already transferred that registered land to a subsequent purchaser (who also has been a *bona fide* purchaser for value without notice) is a claim in damages available to that true owner against that immediate purchaser pursuant to Section 340(2)(b) of the National Land Code?
>
> (The remedy question)

[3] The second appeal, which is Federal Court Civil Appeal No: 02-59-09-2015 (W) is by Rozdenil bin Toni (the plaintiff in the High Court) against part of the order of the Court of Appeal in that the date for the basis of assessment of damages to the plaintiff was varied from 3 July 2014 (the date of the judgment of the High Court) to the date when the property was transferred to the third and fourth defendants by use of the false power of attorney, namely 17 July 2008. In respect of this appeal, leave to appeal was granted on the following question of law:

In quantifying the damages available to the true owner against the immediate purchaser pursuant to Section 340(2)(b) National Land Code, whether the damages to be assessed is as at the date of the true owner's deprivation or as at the date of judgment?

(The calculation of damages question)

[4] We shall be referring to parties in this judgment as they were in the High Court.

[5] The subject matter of the dispute between the parties revolved around a landed property held under Geran No. 32298, Lot No. 7186, Mukim of Cheras, Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur ('the property'). This dispute arose in the context of determining the competing interests of the parties, arising as a consequence of an initial transfer of the property from the plaintiff to the third and fourth defendants by way of a forged Power of Attorney.

[6] In the main, these appeals focus on the claim for damages by the plaintiff as the true original registered proprietor of the property against the third and fourth defendants, who as immediate purchasers, had acquired the property by way of a sale by a third party using a forged Power of Attorney.

Background Facts

[7] The salient background facts and events giving rise to these appeals are as follows. The plaintiff was the administrator of the estates of his deceased parents, Toni bin Ismail and Normy binti Mohamed Khatif. They passed away on 7 October 2002 and 7 September 2005 respectively. Their estate included the property in question.

[8] Originally, the plaintiff had sued altogether seven defendants. The first defendant was the Pengarah Tanah dan Galian Wilayah Persekutuan. The plaintiff's claim against the first defendant was premised on negligence on the part of the first defendant in accepting the registration of the memorandum of transfer of the property to the third and fourth defendants.

[9] The second defendant was the plaintiff's elder brother, Jusrizal bin Toni who wrongfully and illegally sold and transferred the property, which was registered on 17 July 2008 to the third and fourth defendants for a price of RM500,000 using a forged instrument. As observed by the learned High Court Judge, "it is obvious that the culprit was the second defendant".

[10] The following facts are irrefutable. The Power of Attorney utilised by the second defendant was a false instrument because it carried a date of execution well after the death of the plaintiff's (and second defendant's) parents. As mentioned earlier, they died on 7 October 2002 and 7 September 2005, respectively. Yet, the Power of Attorney carried the date 4 December 2006. Moreover, the name of the Commissioner for Oaths that had purportedly witnessed and attested the Power of Attorney was also false.

[11] So far as the evidence goes, the third and fourth defendants were not privy to the forgery. In this regard, the Court of Appeal made an express finding to the effect that the third and fourth defendants had purchased the property in good faith for value.

[12] More significant still, the third and fourth defendants subsequently had on 31 March 2010 sold the property to Teu Shek Fai ("the fifth defendant"), the subsequent purchaser for RM730,000 which sale was registered on 11 August 2010. The property had then been charged to HSBC Bank ("the sixth defendant") as security for a loan granted by it to the fifth defendant.

[13] As events unfolded, the fifth defendant defaulted in the repayment of the loan. The sixth defendant then foreclosed the property. Thereafter, the property was auctioned off and purchased at public auction held on 5 April 2012 by Kotanaz Sdn Bhd ("the seventh defendant"), who is the current registered owner of the property.

[14] The problem arose when, after a land search which was conducted in or around April 2012, the plaintiff discovered that a transfer in relation to the property had occurred from the second defendant to the third and fourth defendants pursuant to a memorandum of transfer dated 18 March 2008 witnessed by a solicitor by using a Power of Attorney allegedly granted by Toni bin Ismail and Normy binti Mohamed Khatif.

[15] In due course, the plaintiff commenced the present action against all the seven defendants by filing a writ of summons and the statement of claim on 9 August 2012. It is material to point out that the plaintiff anchored his claim against the defendants on two distinct causes of action. As we shall explain later, this is an important point that should be kept in mind. The first was a statutory claim under s. 340 of the National Land Code ('NLC'). The plaintiff was essentially seeking for an order to cancel all the dealings pertaining to the property and to have the ownership of the property reverted back to the estate of his parents, that is to say, the true original owner. The second was based on tort of negligence, and for that the plaintiff sought damages from all the defendants.

[16] The second defendant did not enter appearance in the court below and judgment in default was therefore entered against him. In the High Court, the fifth, sixth and seventh defendants successfully brought an application to strike out the plaintiff's claim against them. There was no appeal to the Court of Appeal against this decision.

[17] Therefore, the trial of the plaintiff's action in the High Court was primarily against the first, third and fourth defendants.

Decision Of The High Court

[18] The plaintiff's claim against the first defendant was dismissed by the High Court. There was no appeal to the Court of Appeal against that part of the decision.

[19] In relation to the third and fourth defendants, the High Court applying the landmark decision of this court in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269 held that the title of the third and fourth defendants, as immediate purchasers of the property, was defeasible, as registration in their names had been obtained by means of an insufficient or void instrument. As such s. 340(2)(b) of the NLC came into play, rendering their title defeasible. Further, the High Court made a finding that the defence afforded by s. 340(3), namely deferred indefeasibility, was only available to a subsequent purchaser, which the third and fourth defendants were not.

[20] It was the decision of the High Court that while the third and fourth defendants, as the immediate purchasers, had purchased the property in good faith for value, this was of no avail, in light of the express provision of s. 340(2)(b) of the NLC which stipulates that where the registered title or interest of a person is obtained by forgery or by means of a void instrument the title or interest of any such person or body shall not be indefeasible. In the words of the learned High Court Judge:

> It was repeatedly argued and stressed by the learned counsel for the 3rd and 4th defendants that the 3rd and 4th defendants have no knowledge about the ill doings of the 2nd defendant, and was at all material time not aware that the said PA was fake. The 3rd and 4th defendants strenuously maintained that they were *bona fide* purchasers for valuable consideration of the said Property. It is my considered opinion that such an averment is no defence to the plaintiff's challenge made under s. 340(2)(b) of the NLC to their title to the said Property. Firstly, the defence of *bona fide* purchaser for value applies to subsequent purchaser only. The proviso of s. 340(3) of the NLC does not apply to the 3rd and 4th defendants because they were immediate purchasers. The 3rd and 4th defendants therefore cannot rely on the said proviso. This is what was precisely decided by the *Tan Ying Hong*'s case (*supra*). The fact that the 3rd and 4th defendants had purchased the said Property in good faith for value is not in issue because as was held by Arifin Zakaria, CJ (Malaya) as he was then, in *Tan Ying Hong*'s case (*supra*), once the court is satisfied that the transfer (or charges as in that case) arose from void instruments, it automatically follows that it is liable to be set aside at the instant of the original registered proprietor (ie, the plaintiff herein).

[21] In holding that damages was the appropriate remedy, the learned High Court Judge explained as follows:

> If the said Property is still in name of the 3rd and 4th defendants, I would have no hesitation in ordering that the same be returned to the rightful owner, that is, the plaintiff. As it stands the said Property is no longer available to the plaintiff because it is now owned by the 7th defendant who had purchased it at the public auction.

> I am of the opinion that since the said Property cannot be ordered to be reverted back to the plaintiff, the 3rd and 4th defendants must pay monetary damages and compensation to the plaintiff that is similar to the value of the said Property as at today, that is, the date of this judgment, and such damages and compensation shall be assessed by the registrar. I think this is a fair and reasonable approach. The 3rd and 4th defendants should not benefit from the whole episode. After all they have sold the said property to the 5th defendant at a higher price than what they paid to the 2nd defendant. The 3rd and 4th defendants are of course not without recourse. They are certainly entitled to claim from the 2nd defendant indemnity and compensation, though admittedly it may not mean much since the 2nd defendant may not be easily found. Be that as it may, the law is clear in that the 3rd and 4th defendants' title to the said Property when they purchased it from the 2nd defendant is clearly liable to be set aside because of the said PA was a fake and a forgery.

[22] Accordingly, the High Court allowed the plaintiff's claim against the third and fourth defendants as follows:

(a) declaration that the transfer of the said property from the original owners (ie, the parents of the plaintiff) to the third and fourth defendants *vide* Presentation No. 21840/2008 is void;

(b) that the third and fourth defendants to pay damages equal to the market value of the said property as at the date of this judgment and such market value to be determined and assessed by the Registrar;

(c) interest at the rate of 5% per annum on the said damages from the date it is ordered by the Registrar until full realisation; and

(d) the third and fourth defendants to pay costs of RM10,000 to the plaintiff.

Decision Of The Court Of Appeal

[23] The Court of Appeal affirmed the decision of the High Court that although the third and fourth defendants were *bona fide* purchasers for value without notice this issue was irrelevant because they were immediate purchasers. As the property was no longer in the hands of the third and fourth defendants, the Court of Appeal affirmed the decision of the High Court that the third and fourth defendants to pay damages to the plaintiff. The Court of Appeal in holding that *in lieu* of the retransfer of the property, a claim in damages was available to the plaintiff had cited no authority.

[24] On the specific submission of the third and fourth defendants that the High Court erred in awarding damages to the plaintiff on the ground that damages were only available if the plaintiff had proved that he had been 'wronged' by the third and fourth defendants, this is what the Court of Appeal said:

> The fallacy of the submission is this: by virtue of section 340 sub-section (2)(b), the 3rd and 4th defendants' title was defeasible. However as the property had passed to the hands of a subsequent acquirer for value

without notice as envisaged in the proviso to section 340 sub-section (3), namely the seventh defendant, it followed that the property could not be re-transferred back to the plaintiff.

The plaintiff's remedy for the loss of the property, which is statutorily provided for in section 340 sub-section (2), is solely against the 3rd and 4th defendants. As they are not in a position to return the property to the plaintiff, they are bound to make good such loss by paying damages. The fact that the 3rd and 4th defendants were 'innocent' in that they were unaware of the falsity of the PA does not absolve them from such liability, because it is statutorily imposed under the said section. The contention that no damages are payable because the plaintiff was not 'wronged' by the 3rd and 4th defendants is therefore misconceived.

[25] However, the Court of Appeal varied the date of the basis of assessment of damages as set out in the judgment of the High Court from the date of the judgment, ie, 3 July 2014, to the date of execution of the Form 14A between the fraudulent second defendant and the third and fourth defendants, ie, 17 July 2008. The Court of Appeal set out the reasons in the following terms:

We did however allow an amendment of the date stipulated by the learned judge for the assessment of damages from 3 July 2014 (the date of the judgment) to the date when the property was transferred from the plaintiff to the 3rd and 4th defendants by use of the false PA, namely 17 July 2008. We allowed this amendment because it appeared to us that the latter date more accurately reflected the basis for an estimation of loss to be computed, bearing in mind the entirety of the circumstances of the case.

The Question Of Law On Appeal To The Federal Court

[26] As indicated earlier, this court granted leave on two questions of law. We will deal first with the remedy question. As the key to the determination of this question centered on the proper construction of s. 340(1), (2) and (3) of the NLC, which introduced into our land law the concept of indefeasibility title, it is necessary to look more closely at the provision. It is therefore apposite to set out *in extenso* its terms as follows:

340. (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible –

(a) In any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) Where registration was obtained by forgery, or by means of an insufficient or void instrument; or

A (c) Where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) –

B (a) It shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) Any interest subsequently granted thereout shall be liable to be set-aside in the hands of any person or body in whom it is for the time being vested:

C Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[27] In considering these appeals, at the outset, it is necessary to bear in mind that indefeasibility can be immediate or deferred. Arifin Zakaria CJ D (Malaya) (as His Lordship then was) in *Tan Ying Hong v. Tan Sian San & Ors* (*supra*) explained the two concepts as follows:

> Immediate indefeasibility means that the immediate registered title or interest of the proprietor or transferee immediately to the vitiating circumstances will be conferred statutory protection despite the existence E of any vitiating circumstances. In the case of deferred indefeasibility, the indefeasibility only comes to be attached to the title or interest upon a subsequent transfer. Thus, the difference between immediate and deferred indefeasibility hinges on the effect of registration *vis a vis* the title or interest.

F **[28]** Tan Sook Yee's *Principles of Singapore Land Law* (3rd edn) at p. 285 illustrated the difference between immediate and deferred indefeasibility as follows:

> In the early days of Torrens jurisprudence, there was some uncertainly as to whether a registered proprietor obtained an immediate indefeasible title G or merely a deferred indefeasible title. An immediate indefeasible title means that the registered proprietor's title becomes indefeasible once his title is registered, notwithstanding that the source of the new registered proprietor's title might be the result of forgery. A deferred indefeasible title, on the other hand, defers the shield of indefeasibility until the next purchaser. An illustration of the difference between both theories is as H follows: X is the original owner. Y forges X's signature and sells the property to Z, who was not privy to the forgery. Z registers the transfer and becomes the new registered proprietor. If indefeasibility were conferred immediately, Z's rights over the land will prevail over X's, notwithstanding that Z's title was derived from forged documents. In contrast, under the theory of deferred indefeasibility, Z's rights will not I prevail as against X. However, should Z then sell the land to A, A will be able to claim indefeasibility as against X. Indefeasibility of title is thus conferred to the next purchaser.

[29] In the context of the present case, the remedy question is inextricably intertwined with the application of the principle of deferred indefeasibility title under the Malaysian Torrens System in cases of transfer of titles by way of fraud, forgery and insufficient instruments. In order to answer the question posed it is therefore necessary to look at the principle more carefully.

[30] It should be noted that before the case of *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* (*supra*), the predominant view was that s. 340 of the NLC confers deferred indefeasibility as opposed to immediate indefeasibility. This was decided by our then Supreme Court in *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14; [1994] 1 MLJ 294 where it was held that where the vendor's title is good but the instrument that was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility, the registration of which can be set aside. It is irrelevant whether the immediate registered proprietor was a party or privy to the forgery or a *bona fide* purchaser for good value.

[31] However, the Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* (*supra*) held that a purchaser in good faith for valuable consideration could obtain a good title to a land even though the instrument of transfer was a forged instrument. Most importantly, the court held that our land law applied immediate indefeasibility and not deferred indefeasibility. That was the case in which the respondent claimed that she was the registered proprietor of a piece of land, which had been sold and transferred to the appellant. The respondent claimed that someone forged her signature and sold and transferred the subject land to the appellant. She claimed to be restored as the registered owner of the land. The Federal Court held that the appellant was a proprietor with an immediate indefeasible title under s. 340(1) of the NLC and could also claim to be a *bona fide* purchaser under the proviso to s. 340(3). Hence, the appellant as the immediate proprietor obtained immediate indefeasible title to the land in question even if they purchased it through an instrument of transfer, which was forged. The court decided that the appellant who had acquired the land directly from a forger to have an indefeasible title to the land because the appellant was regarded as a *bona fide* purchaser for value without notice. As a result of this decision, the respondent, as an innocent landowner, found herself deprived of her land by forged instrument of dealing. This brought about serious concerns amongst landowners who became vulnerable to their land even through instruments of transfer, which are forged.

[32] The uncertainties and concerns were finally laid to rest almost a decade later in the case of *Tan Ying Hong v. Tan Sian San & Ors* (*supra*). In that case, the plaintiff was the registered owner of a piece of land. The first defendant purporting to act under a Power of Attorney executed two charges in favour of the bank (the third defendant) as security for a loan granted to

the second defendant. The plaintiff claimed that he did not sign the Power of Attorney. Evidently, the power of attorney was forged, as the plaintiff never executed it. The most important issue in that case was whether s. 340 of the NLC conferred immediate or deferred indefeasibility upon the registered proprietor or any person having registered interest in the land. The following single question was posed to the Federal Court: "Whether an acquirer of a registered charge or other interest or title under the National Land Code by means of a forged instrument acquires an immediate indefeasible interest or title?". The Federal Court answered the question in the negative. In other words, it was held that the bank, that is to say, the third defendant in that case did not acquire an immediate indefensibility of interest on the land but a deferred one. The Federal Court ruled that *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* (*supra*) was wrongly decided. It was further held that the fact that the third defendant acquired the interest in question in good faith for value was not in issue, because once the court was satisfied that the charges arose from a void instrument, it automatically followed that they were liable to be set aside at the instance of the registered proprietor namely, the plaintiff.

[33] The reasons underlying this decision appeared in the judgment of the court given by Arifin Zakaria CJ (Malaya) (as His Lordship then was) as follows:

> [50] As we see it, sub-s. (3) merely provides that any title or interest of any person or body which is defeasible by reason of any of the circumstances specified in sub-s. (2) shall continue to be liable to be set aside in the hands of subsequent holder of such title or interest. This subsection, however, is subject to the proviso, which reads:
>
> > Provided that nothing **in this subsection** shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser, (emphasis added)
>
> [51] We are of the view that the proviso is directed towards the provision of sub-s. (3) alone and not to the earlier subsection, this in our view is supported by the use of the words "in this subsection" in the proviso. Therefore, its application could not be projected into the sphere or ambit of any other provisions of s. 340.
>
> [52] Furthermore, even though sub-s. (3)(a) and (b) refer to the circumstances specified in sub-s. (2) they are restricted to subsequent transfer or to interest in the land subsequently granted thereout. So it could not apply to the immediate transferee of any title or interest in any land. Therefore, a person or body in the position of *Adorna Properties* could not take advantage of the proviso to the sub-s. (3) to avoid its title or interest from being impeached. It is our view that the proviso which expressly stated to be applicable solely to sub-s. (3) ought not to be extended as was done by the Court in *Adorna Properties*, to apply to sub-s. (2)(b). By so doing the court had clearly gone against the clear

intention of Parliament. This error needs to be remedied forthwith in the interest of all registered proprietors. It is, therefore, highly regrettable that it had taken some time, before this contentious issue is put to rest.

[53] For the above reasons, with respect, we hold that the Federal Court in *Adorna Properties* had misconstrued s. 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the proviso appearing in sub-s. (3) equally applies to sub-s. (2). By so doing the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC which we think is contrary to the provision of s. 340 of the NLC.

[34] Zaki Tun Azmi CJ in that case summarised the effect of concept of indefeasibility of title under s. 340 of the NLC in the following terms:

(4) I would like to look at s. 340 of the NLC in a more simplified manner.

(5) Let us refer to the first owner of a piece of land as "A" who then transfers the same piece of land to "B" and which subsequently is transferred to "C".

(6) As far as s. 340(1) of the NLC is concerned, A's title to the land is totally indefeasible. In short if A's name appears on the registration, no one can come and claim for that title. The law will not entertain it at all.

(7) Now comes the next person, B, whose name appears in the register. If it can be shown that the title or interests obtained by B was obtained by fraud or misrepresentation by him or anyone else to which he was a party or privy then his claim to the title or interest can be defeated. (See s. 340(2)(a) of the NLC). Otherwise B stands in the same position as A.

(8) The situation where it is proved that the registration in B's name was obtained by forgery or by means of an insufficient or void instrument is the same (See s. 340(2)(b) of the NLC). His title or interest to the land is liable to be set aside by the previous owner who has a good title. In this latter instance, there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest by a void instrument.

(9) The third instance where B's title or interest could be defeated is where it was unlawfully acquired through the exercise of any power or authority conferred by any law. Section 340(2)(c) of the NLC deals with one who was for example acting in his capacity as an agent to a power of attorney. Even if C is in the same position as B, sub-section (3) also does not give protection to C unless he can show that he had acquired the title or interest in good faith and for valuable consideration. Any title or interest gained by any person thereafter is also liable to be set aside unless it could be shown that he had acquired it in good faith and for valuable consideration. This is what is called deferred indefeasibility of title. If his title or interest is challenged on similar grounds, the burden of proving there was valuable consideration and good faith lies on him.

[35] The principle established in *Tan Ying Hong v. Tan Sian San & Ors* (*supra*) was adopted and applied by this court in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768. That case

illustrates the concept of deferred indefeasibility very well. It is important that we look at it a little more closely and consider the judgment in some detail.

[36] In *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* (*supra*) the deceased was the registered co-proprietor of a one-third undivided share in two lots of land. She died in Indonesia in 1941 without issue. Some 43 years later, the first respondent applied for and obtained an order to distribute the deceased's share in the two lots of land among himself and the first to fourth respondents. The first to fourth respondents transferred their share in the two lots of land to the fifth and sixth respondents in consideration for the sum of RM25,000 and RM16,000 respectively. The appellants, who were the nephew and nieces of the deceased, filed a suit against the defendants whereby they sought to set aside the title to the two lots acquired by the fifth and sixth respondents. The cause of action of the appellants against the first to fourth respondents was fraud in the distribution of the estate of the deceased. The appellants pleaded that the first to fourth respondents had acquired title to the two lots by fraud and misrepresentation, in that they falsely stated that they were the children or beneficiaries of the deceased when they applied for and obtained the order of distribution. As a result of this fraud the appellants claimed that the fifth and sixth respondents had not acquired an indefeasible title to the two lots. The appellants also pleaded that the seventh respondent, which was the governmental authority that granted the order of distribution, was negligent when it vested the deceased's share in the two lots to the first to fourth respondents. The appellants obtained judgment in default against the first to fourth respondents, who did not defend the claim. However, the fifth and sixth respondents claimed that as *bona fide* purchasers of value they had obtained an indefeasible title. Although the High Court held that the first to fourth respondents had no right to transfer title or interest in the lots to the fifth and sixth respondents, it went on to hold that the fifth and sixth respondents had yet acquired an indefeasible title or interest in the two lots, as they had not acquired their title or interest by fraud. The appellants appealed to the Court of Appeal.

[37] The Court of Appeal found fraud on the part of the first to fourth respondents but held that the fifth and sixth respondents, in absence of fraud on them, were protected by the proviso to s. 340(3) of the NLC and had acquired an indefeasible title or interest. In allowing the appeal, the Federal Court noted that both the trial court and the Court of Appeal held that the fifth and sixth respondents were *bona fide* purchasers. However, both courts failed to inquire whether the fifth or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser was entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquired a title that was not indefeasible. Thus, even if the fifth and sixth respondents were *bona fide* purchasers, they could not by that fact alone have acquired a shield of indefeasibility unless they had

been *bona fide* subsequent purchasers. In the present case, the first to fourth respondents, from whom the fifth and sixth respondents obtained title were not immediate purchasers but rather imposters of those entitled to the estate of the deceased. Therefore, when the fraudulent title of the first to fourth respondents was set aside by the default judgment, the defeasible title of the fifth and sixth respondents was also defeated. As immediate purchasers, the fifth and sixth respondents were not protected by the proviso to s. 340(3) of the NLC.

[38] Jeffery Tan FCJ in delivering the judgment of the court said that the defeasible title of a *bona fide* immediate purchaser only becomes indefeasible when it is subsequently passed to a *bona fide* subsequent purchaser. We find it instructive to quote the relevant passage from his judgment as follows:

> [43] In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were *bona fide* purchasers. But unfortunately, both the trial court and the Court of Appeal failed to inquire whether the fifth and or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from *Tan Ying Hong* that the *bona fides* of an immediate purchaser is not a shield to defeasibility. The defeasible title of a *bona fide* immediate purchaser is still liable to be set aside. The defeasible title of a *bona fide* immediate purchaser only becomes indefeasible when it is subsequently passed to a *bona fide* subsequent purchaser. That the fifth and sixth respondents were *bona fide* purchasers could not by that fact alone give a shield of indefeasibility. The fifth and or sixth respondents only acquired an indefeasible title if they were *bona fide* subsequent purchasers. But for the fifth and sixth respondents to have been *bona fide* subsequent purchasers, there must have been an immediate purchaser in the first place. The first to fourth respondents, from whom the fifth and sixth respondents obtained title, were not immediate purchasers. Rather, they were imposters of those entitled to the estate of the deceased. They, like the fake Boonsom who impersonated the true Boonsom, had no title to pass to the fifth and sixth respondents. The fifth and sixth respondents, who were the immediate purchasers, acquired a title that was not indefeasible. But when the fraudulent title of the first to fourth respondents was set aside by the default judgment, the defeasible title of the fifth and sixth respondents was also defeated.

[39] At this juncture, it would be appropriate to provide a summary of the principle of deferred indefeasibility up to this point. It is now settled that s. 340 of the NLC provides for the concept of deferred indefeasibility and that the defeasible title of a *bona fide* immediate purchaser becomes indefeasible when it is subsequently passed to a *bona fide* subsequent purchaser. Teo Keang Sood and Khaw Lake Tee in *Land Law in Malaysia, Cases and Commentary* (3rd edn) at para. 4.34 correctly state the law upon this subject matter: Deferred indefeasibility postpones the badge of immunity where registration was obtained by way of a forged or void or insufficient

instrument until the title is registered in the name of a subsequent purchaser in good faith, whereupon indefeasibility will attach to the title or interest, as the case may be. Indefeasibility is deferred even where the registered proprietor or interest holder has not occasioned the defect in the instrument or was not party to the forgery.

[40] In this context, we would add that we find some cogency in the opinion of David SY Wong in his book *Tenure and Land Dealings in the Malay States*, where he said, with the necessary emphasis, as follows:

> The risk of any such loss being visited on a holder of registered title or interest in land is inherent in the working of the Torrens system. Indefeasibility of title is the protection given to a proprietor against adverse claims and by itself does not ensure protection against the proprietor being subsequently deprived of his title. In fact, once any person acquires an indefeasible title it must mean the extinguishment of the title in the hands of any previous proprietor even where the previous proprietor has been wrongfully or erroneously deprived of the same. Such risk is evidently greater under a Torrens system of 'immediate indefeasibility'. Nonetheless, even though under the Malaysian Torrens system a person who has, through fraud or acts of other persons, been deprived of his title may recover it from the immediate newly registered proprietor where the latter has acquired it in any of the specified circumstances under Section 340(2), once the title passes into the hands of a subsequent *bona fide* purchaser for valuable consideration, his right of recovery is gone beyond recall.

[41] In similar vein, in her book *National Land Code A Commentary*, Judith Sihombing at p. 797 says this:

> The deferred indefeasible title must be challenged timeously for otherwise the defeasible proprietor can pass an indefeasible title to a *bona fide* purchaser for value without notice.

[42] Reverting to the remedy question, the main submissions made on behalf of the third and fourth defendants may be summarised as follows. They accepted the principle enunciated in the case of *Tan Ying Hong v. Tan Sian San & Ors* (*supra*). However, it was highlighted that the case of *Tan Ying Hong v. Tan Sian San & Ors* (*supra*) is distinguishable on its facts because in the present case at the material time when the plaintiff filed this action, the property was no longer available to the plaintiff because it had already been registered in the name of the subsequent purchaser, that is to say, the fifth defendant, who was also a *bona fide* purchaser for value without notice. Damages could only be awarded if s. 340 of the NLC itself provides so. Section 340 does not provide for damages *in lieu* of the return of the property. All it provides is for the setting aside of the impugned title or interest, and consequently, the return of the property to the true owner, only if the property is still in the possession of the immediate purchaser. The plaintiff commenced this action on 9 August 2012. On this date, the property was no longer in the hands of the third and fourth defendants because they had

already sold the property to the fifth defendant on 31 March 2010, which sale was registered on 11 August 2010. Had the plaintiff taken quick action against the third and fourth defendants before the latter sold the property to the fifth defendant then the plaintiff would have succeeded in having the property back. However, once the property had been sold to the fifth defendant, the title to the property was beyond recall.

[43] Learned counsel for the plaintiff responded as follows. Had the Court of Appeal taken the entire facts and circumstances into consideration, it could not possibly conclude that the third and fourth defendants were a *bona fide* purchaser for valuable consideration. We do not see any merit in this line of argument. The court below had made an express finding that the third and fourth defendants had purchased the property in question in good faith for value. It has not been shown that the finding was plainly wrong or perverse in any way. In our view, the entire evidence of facts and circumstances was amply sufficient to justify that finding.

[44] Learned counsel for the plaintiff also referred to the case of *Tara Rajaratnam v. Datuk Jagindar Singh & Ors* [1983] 1 CLJ 257; [1983] CLJ (Rep) 892; [1983] 2 MLJ 127 to support his contention that s. 340 of the NLC not only allowed the court to set aside the impugned transfer but also to award damages to the plaintiff *in lieu* of the title as the property was no longer in the hands of the third and fourth defendants.

[45] For the proper determination of this case, as submitted by learned counsel for the third and fourth defendants, it is imperative to bear in mind that the facts of this case are different from the facts in *Tan Ying Hong v. Tan Sian San & Ors* (*supra*). By contrast in that case, as stated earlier, the first defendant who was the wrongdoer acted under a forged Power of Attorney executed two charges in favour of the bank to secure a loan for the second defendant. Subsequently, the second defendant reneged on the repayment and the bank therefore demanded payment from the plaintiff. The bank was still the registered chargee at the time of filing of the suit. That is why, the Federal Court had little difficulty in declaring the bank's charges void and set it aside since at the time of filing of the suit and at the date of judgment, the bank was still the registered chargee.

[46] On the other hand, in the present case, the difficulty arose because at the material time the plaintiff filed the action in the High Court, the third and fourth defendants as immediate purchasers were no longer the registered proprietors of the property since they had sold it to the fifth defendant, the subsequent purchaser who had, evidently, purchased the property in good faith for value. That is the crucial difference between the present case and the case of *Tan Ying Hong v. Tan Sian San & Ors* (*supra*). This raises a difficult point of law. This difficulty, undeniably, confronted both the High Court and Court of Appeal. In this, the High Court and the Court of Appeal had no precedent to fall back on.

[47] On the basis of the law as we apply today, as set out by this court in *Tan Ying Hong v. Tan Sian San & Ors* (*supra*), which was subsequently followed by *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* (*supra*) and the recent decision of this court in *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1, the third and fourth defendants were immediate purchasers. As immediate purchasers of a title tainted by a forged Power of Attorney, they acquired a title that was not indefeasible. That the third and fourth defendants were *bona fide* purchasers could not by that fact alone give a shield of indefeasibility. The defeasible title of the third and fourth defendants was still liable to be set aside before the fifth defendant, the subsequent purchaser became the holder of the registered title of the property on 11 August 2010. However, by the time the plaintiff as the true original registered proprietor commenced the present action on 9 August 2012, the defeasible title of the third and fourth defendants as *bona fide* immediate purchasers had become indefeasible when it was subsequently passed to the fifth defendant, a *bona fide* subsequent purchaser. It therefore follows that the High Court and the Court of Appeal had gone too far to declare that the transfer of the property from the original owners (that is to say the parents of the plaintiff) to the third and fourth defendants was void. Unlike in the case of *Tan Ying Hong v. Tan Sian San & Ors* (*supra*), the issue of setting aside the third and fourth defendants' title to the said property did not arise as the property had been sold to the fifth defendant, who was *bona fide* purchaser without notice; a retransfer of the property to the plaintiff's name was therefore not possible in the circumstances. The plaintiff's right of recovery of the property, to borrow the words of David SY Wong, "is gone beyond recall".

[48] Given the above circumstances, the most important question that we must ask here is whether *in lieu* of the retransfer of the property, a claim in damages is available to the plaintiff as the true owner of the property under s. 340 of the NLC. In our judgment, the question must be approached on the basis of the provision itself. The plaintiff's case must stand and fall on the basis of this specific provision. It is to that provision we must look at. It is necessary to read the wordings and purport of the provision with great care. The first important point to notice is that s. 340(2) of the NLC creates a cause of action, which is in effect a form of action independent of any common law claim for tort or breach of contract. Over and above this, it is important to appreciate that the cause of action envisaged under s. 340 of the NLC is a statutory claim, where the relief is explicitly specified therein, that is to say, setting aside the title or interest in question. Once the legislative scheme in s. 340 is properly understood, it is apparent that the provision does not envisage a relief in damages at all; there is clearly no provision in relation to damages. In this regard, there is a general rule that when right is created by a statute and a special sanction is also given by the same statute regard must be had to that sanction, and the obligation can only be enforced in the prescribed manner (see *The Cobar Corporation Limited and Rubind Henrik Corbett (Trustee) v. The Attorney-General For New South Wales* [1909] 9 CLR 378).

[49] Legal rights are either *in rem* or *in personam*. We should point out that a statutory claim brought to set aside a title or interest upon one or more of the grounds of defeasibility specified under s. 340 of the NLC, as in the present case, is an action *in rem* brought for the assertion of property, which is enforceable against the world at large, as opposed to right *in personam* for damages which is enforceable against specified person and arose out of an obligation whether in contract or in tort (see *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719, *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77 and *Webb v. Webb (E.C.J)* [1994] QB 696). Some 60 years ago, in the case of *Bachan Singh v. Mahinder Kaur & Ors* [1956] 1 LNS 14; [1956] 1 MLJ 97, Thomson J (as His Lordship then was) reminded us that many of the difficulties in cases relating to land, "would not arise if we were to bear in mind throughout the distinction between rights *ad rem* or personal rights and rights *in rem* or real rights". We will deal with the plaintiff's claim *in personam* for damages at a later stage of this judgment.

[50] *McGregor on Damages* (18th edn), at p. 3, observed that it is impossible to search for a clear-cut, comprehensive meaning of the term 'damages'. According to *McGregor* damages in the vast majority of cases are the pecuniary compensation, obtainable by success in an action, for a wrong that is either tort or a breach of contract, the compensation being in the form of a lump sum awarded at one time, unconditionally and in sterling. In short, in general terms, damages are an award in money for a civil wrong. There is no right to an award of damages unless the court has power to award it. Support for this proposition can be found in *McGregor on Damages* (*supra*) at pp. 5-8 as follows:

> The vast number of money claims are claims for compensatory damages arising from tort or breach of contract; the everyday damages action is so based. There are however also claims for money, which are neither claims dependent upon tort or breach of contract nor claims for damages. For the sake of clarity it is important to identify these claims for money which are not required to satisfy any definition of damages because they fall outside it. After these there remain those claims which are indeed actions for damages but are not dependent upon there being a tort or breach of contract. These are the cases which do not satisfy the general definition. They are, as will be seen, indeed few so that it can be said that there has been little departure from this central requirement in the definition.
>
> (a) Money claims, which are not based upon a tort or breach of contract and are not actions for damages. There are four types of case in which pecuniary satisfaction is gained by success in an action and which are yet outside the above definition. These are actions for money payable by the terms of a contract, actions in restitution, actions in equity and actions under statutes where the equitable or statutory right to recover is independent of any tort or breach of contract.

A (1) ...

(2) ...

(3) ...

(4) actions claiming money under statutes, where the claim is made
B independently of a wrong which is a tort or breach of contract, are not actions for damages.

[51] We now turn to deal with the decision of *Tara Rajaratnam v. Datuk Jaginder Singh & Ors* (*supra*), which was much canvassed by learned counsel for the plaintiff in his written submission. We have read in detail the
C judgment of the High Court to point out that the High Court had treated the damages it awarded to the plaintiff on the basis of the common law of deceit and not on s. 340 of the NLC. Very briefly, in that case, the plaintiff complained that her own lawyers had defrauded her. Having got the land registered in their names, the land was subdivided and the plots were sold
D to several members of the public, who were *bona fide* purchasers without notice. When the plaintiff filed the action, the land was no more in the hands of the lawyers who were the immediate registered proprietors. Hence, a retransfer of the land to the plaintiff was not possible. In his judgment, Abdul Razak J was very clear that his award of damages was based on the tort of deceit and not on s. 340 of the NLC. This was the conclusion of the
E learned judge:

> The 1st, 2nd and 3rd defendants shall be jointly and severally liable for the tort of deceit but the 1st and 2nd defendants shall be jointly and severally liable for the breach of contract.
>
> F ...
>
> I would therefore in the circumstances award a sum of $973,000 as general damages to the plaintiff with costs to be taxed. As I said earlier this sum represents the award for the tort of deceit only, but having considered the other claims, it would necessarily also cover them, if need be. This sum, as has already been stated does not include the amount for exemplary
> G damages.

[52] Subsequently, the lawyers appealed to the Federal Court. The appeal was dismissed. The judgment of the Federal Court is reported as *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1983] 1 LNS 21; [1983] 2 MLJ 196. In this regard, an analysis of that case by Professor Visu
H Sinnadurai in his book, *Sale and Purchase of Real Estate in Malaysia* is instructive. This is what the learned professor said:

> One of the important issues dealt with by the Federal Court in *Datuk Jaginder Singh v. Tara Rajaratnam* was the measure of damages which
> I should be awarded to the respondent. As the property had already been subdivided and sold to several members of the public, who were *bona fide* purchasers without notice, a re-transfer of the property to the respondent's name was not possible.
>
> ...

Furthermore, as the appellants were found liable for fraud, breach of contract, undue influence and breach of trust, the proper mode of giving relief to the respondent posed further difficulties. The Federal Court, however, agreed with the assessment of damages by the trial Judge. Lee Hun Hoe CJ said:

> In assessing damages the learned Judge has clearly kept in mind the purpose and aim of the compensation, whether for breach of contract or fraud, the general rule of putting 'the person whose right has been invaded in the same position as if it had been respected'.

His Lordship then said:

> The learned Judge had gone into the case very thoroughly and carefully. …In the exercise of his discretion the learned Judge decided to do the best he could in assessing damages… He decided to award damages for fraud, which would also cover other heads of damages.
>
> Though the Federal Court agreed with the trial Judge on the assessment of damages, the basis upon which such damages were assessed was not made clear. Counsel for the appellants had earlier argued that he was not relying on the common law fraud but rather on actual fraud as laid down under section 340 of the National Land Code. He further submitted that if the Court found fraud under 340, the Court had only the power set aside the transfer and not to award damages. It is not clear whether in fact the transaction between the parties was challenged on the grounds of fraud as defined in section 17 of the Contract Act. The judgment of the Federal Court was focussed mainly on the definition of 'fraud' under section 340 of the National Land Code and a comparison of that definition with fraudulent misrepresentation under the common law. The Federal Court was correct in holding that fraud under the National Land Code was not limited to 'fraudulent misrepresentation' alone. But whether fraud as defined in the Contract Act was narrower or broader than fraud under the National Land Code was not made clear. There is, however, some suggestion by counsel for the respondent that fraud under the Torrens system is wider than the definition of fraud under the common law.
>
> ...
>
> … Though in *Tara Rajaratnam*'s case, the Federal Court agreed with the measure of damages awarded by the trial Judge 'on the basis of fraud' which was 'the highest attainable' and would necessarily cover the claim for undue influence, breach of contract or trust as well, the Court did not spell out whether this award of damages for fraud was under section 340 of the National Land Code or section 17 of the Contract Act or both. It was rather unfortunate that there was no detailed discussion in the Federal Court as to the law relating to the recovery of damages for fraud.

[53] The matter then went up on appeal to the Privy Council (see *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1985] 1 LNS 157; [1986] 1 MLJ 105). Lord Keith of Kinkel in delivering the judgment of the Board underlined the crucial fact that the claim upon which the plaintiff had thus obtained judgment in the High Court was based upon a number of grounds – fraud, breach of contract, undue influence and breach of trust. Lord Keith laid emphasis that the High Court found that fraud had been established against all three appellants and its finding was upheld by the Federal Court. To bring home the point that s. 340 of the NLC had no bearing on the award of damages, this is what Lord Keith said:

> The judgments both of Abdul Razak J and the Federal Court are very lengthy, particularly the former's, and in some respects difficult to follow. Consideration was given, at particularly great length by the Federal Court, to the meaning of the word "fraud" in section 340 of the National Land Code, a matter which at the hearing before the Board was agreed by counsel on both sides to be irrelevant.

[54] Put simply, the Board had clearly spelt out that the award of damages was not made under s. 340 of the NLC but in point of fact were awarded in tort. Learned counsel for the plaintiff was therefore plainly wrong in treating the case of *Tara Rajaratnam v. Datuk Jagindar Singh & Ors* as having stated the proposition that s. 340 of the NLC not only allowed the court to set aside the impugned transfer but also to award damages as the property was no longer in the hands of the third and fourth defendants.

[55] Moreover, in our view, to accede to the interpretation contended by learned counsel for the plaintiff that damages may be awarded would tantamount to reading into s. 340 of the NLC words, which are not there. With respect, as judges, we are not entitled to read words into a statute unless clear reason for it is to be found in the statute itself. In this context, Nik Hashim FCJ in delivering the decision of this court in *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2007] 5 CLJ 673 said:

> [18] In construing a statute the duty of the court is limited to interpreting the words used by the legislature and to give effect to the words used by it. The court is not entitled to read words into a statute unless clear reason for it is to be found in the statute itself.
>
> [19] In *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79 Seah SCJ delivering the judgment of the then Supreme Court reminded at pp. 22 and 23:
>
> > It must always be borne in mind that we are Judges, not legislators. The constitutional function of the courts is not only to interpret but also to enforce the laws enacted by Parliament. In enforcing the law we must be the first to obey it. It should be noted that the power of a court to proceed in a particular course of administering justice, was one of substance and not merely of form. The duty of the court, and its only duty, is to expound the language of Act in accordance with the settled rules of construction. The court has

> nothing to do with the policy of any Act, which it may be called upon to interpret. That may be a matter for private judgment. It seems to us to be unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a court censure on the Legislature (see Lord Chelmsford in *R v. Hughes* and Lord Macnaghten in *Vacher & Sons v. London Society of Compositors*).

[20] The case of *NKM Holdings Sdn Bhd* (*supra*), was referred to by my learned brother Augustine Paul FCJ in the recent case of *Metramac Corp Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177 where he said at p. 200:

> Thus when the language used in a statute is clear effect must be given to it. As Higgins J said in *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* [1920] 28 CLR 129 at pp. 161-162:
>
> > The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning even if we think the result to be inconvenient, impolite or improbable.

[56] By awarding damages to the plaintiff, the High Court and the Court of Appeal had extended the scope of s. 340 of the NLC. With respect, the High Court and the Court of Appeal had no jurisdiction to do so. The award of damages is not within the contemplation of the Legislature.

[57] As a result, for all the reasons set forth earlier, we therefore conclude that s. 340 of the NLC does not provide for the remedy of damages. In our judgment, all that s. 340 provides is the setting aside of the impugned title or interest upon one or more of the grounds of defeasibility specified therein. Yet again, keeping in mind that it is an action *in rem*, which is an action directed towards property, we are not at all convinced that under s. 340 of the NLC the court has the power to award damages. With respect, both the High Court and the Court of Appeal erred in law and in fact culminating in a miscarriage of justice in holding that as the third and fourth defendants were in no position to return the property to the plaintiff, they were statutorily bound to make good such loss by paying damages. This is in itself sufficient to warrant appellate interference on our part.

[58] Thus far, we are firmly of the view that under s. 340 of the NLC the court has the power to set aside a title or interest but not to award damages. Leaving that on one side for the moment, it is relevant to note that, as we have said earlier, in his statement of claim, the plaintiff also specifically claimed damages against the third and fourth defendants.

[59] It is to be emphasised here that the concept of indefeasibility does not exclude the court's jurisdiction to grant relief in a claim *in personam* founded in law or equity which is enforceable against or binding on the registered proprietor (see Teo Keang Sood and Khaw Lake Tee in *Land Law in Malaysia, Cases and Commentary* (*supra*) at para. 4.152). Lord Wilberforce in *Frazer v. Walker* [1967] 1 AC 569 emphasised that the principle of indefeasibility of title "no way denies the right of a plaintiff to bring against a registered proprietor a claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant". In the case of *Ho Kon Kim v. Lim Gek Kim Betsy and Others and Another Appeal* [2001] 3 SLR(R) 220, the Singapore Court of Appeal held that the indefeasibility of title of a registered proprietor, or its agent, of land under the Land Titles Act (Cap 157, 1994 Rev Ed) was subject to exceptions, two of which were fraud on the part of the registered proprietor or its agent and claims *in personam* made against the registered proprietor or its agent by reason of his own conduct.

[60] We once again return to the present case. The plaintiff's claim *in personam* for damages against the third and fourth defendants was founded in tort of negligence. In his statement of claim the plaintiff averred that the third and fourth defendants accepted the transfer of the property from the second defendant even though they had reasons to know that the Power of Attorney was false. This is how it was pleaded in para. 9 of the statement of claim:

> 9. The 3rd and 4th Defendants were negligent as follows:
>
> PARTICULARS OF LIABILITY OF THE 3RD AND 4TH DEFENDANTS
>
> a. Had transferred the Land from the 2nd Defendant wrongfully even though they had valid reasons to know that the said PA was false.
>
> b. Had transferred the Land fraudulently from the 2nd Defendant even though they had reasons to know that the 2nd Defendant had no right to execute the Form 14A.
>
> c. Had purchased the Land fraudulently with the intention to gain profit upon selling the Land to others.
>
> d. Had caused the Estate the loss by the said registration on the Title.
>
> e. Had transferred the Land fraudulently and or caused the Land to be transferred fraudulently to the 5th Defendant.
>
> f. Had caused the Estate loss of interest by the registration of the ownership on the Title.
>
> g. Failing to ensure that the ownership of the Estate was not disturbed as guaranteed under the NLC.

h. Failing to take all reasonable steps to correct the situation so that the interest of the Estate would be returned when claimed by the Plaintiff.

i. Causing the Plaintiff the failure in getting the transmission done by registering his name as the Administrator of the Land.

[61] However, when it came to adducing evidence, the plaintiff had not at all brought home the case of negligence against the third and fourth defendants. There was no attempt whatsoever by the plaintiff to affix any knowledge of the defective Power of Attorney on the part of the third and fourth defendants. On the contrary, the third and fourth defendants had proven their defence as *bona fide* purchasers of the property for value without notice. In our judgment, in the circumstances of this case, damages as a relief in a claim *in personam* founded in tort were only available if the plaintiff had proven that the third and fourth defendants had wronged him in a way as can be seen in the case of *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* (*supra*). We draw support for this view from the judgments in *Hay Or Bourhill v. Young* [1942] 2 All ER 396 and *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1994] 1 CLJ 19; [1993] 3 MLJ 352. Unfortunately for the plaintiff, this was not the case here.

[62] True, the plaintiff had suffered. But in the circumstances of this case his remedy is against the second defendant, who was the one who wrongfully caused the plaintiff's loss. The plaintiff had obtained judgment in default against the second defendant. The plaintiff should then proceed to assess damages against the second defendant.

Conclusion

[63] For all the reasons that we have explained, we conclude by saying that we will answer the remedy question in the negative. Consequently, it is not necessary to answer the calculation of damages question. We would prefer to leave the point open.

[64] In the result, we allow the appeal by the third and fourth defendants with costs. The appeal by the plaintiff is dismissed. Consequently, the orders of the High Court and the Court of Appeal are set aside.